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### Armed Conflict-Related Detention of Particularly Vulnerable Persons: Challenges and Possibilities

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## Armed Conflict-Related Detention of Particularly Vulnerable Persons: Challenges and Possibilities

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The thoughts and opinions expressed are those of the author and not necessarily of the U.S. government, the U.S. Department of the Navy, or the U.S. Naval War College.

## I. INTRODUCTION

Persons detained for reasons related to an armed conflict are in a vulnerable position.<sup>1</sup> They have been deprived of their liberty; they are in the hands of the adverse party, the very entity against which the armed conflict is being fought; and they are at the mercy of their captors. The situation of detainees is perhaps even more precarious in non-international armed conflicts than in international armed conflicts, as ideologies and emotions tend to be heightened.<sup>2</sup> During international and non-international armed conflicts, detainees are frequently mistreated. For example, in the armed conflicts in Syria, there are reports of numerous detainees being tortured, beaten to death, and dying as a result of inhuman conditions of detention.<sup>3</sup> The International Criminal Tribunal for the former Yugoslavia found that conditions of detention were sometimes appalling, with detainees provided insufficient food and water, being housed in poor sanitary conditions, and numerous detainees being crammed into small spaces.<sup>4</sup>

Certain groups of detainees—the wounded and sick, women, children, those with disabilities, and the elderly—are in a particularly vulnerable position when compared with “ordinary” detainees. Additionally, the way in which non-international armed conflicts are fought can make it difficult for some parties to comply with those rules benefiting particularly vulnerable detainees. For example, in conflicts in which a State intervenes on the side of the State party to the conflict, the intervening State does not necessarily have the same capabilities as the State on whose territory the conflict is taking place. Even in non-international armed conflicts that are fought entirely within a single State, the type of detention facility will affect the conditions of detention. The same standards cannot be expected of transit centers as of long-term detention facilities. The capabilities of parties to a non-international armed conflict also vary considerably. Some non-State armed groups do not control territory and have limited resources and capabilities. These

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1. This is true of detention generally, including detention in peacetime.

2. L. C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 355 (3d ed. 2008).

3. See, e.g., U.N. Human Rights Council, *Out of Sight, Out of Mind: Deaths in Detention in the Syrian Arab Republic* [Advance Version], U.N. Doc. A/HRC/31/CRP.1 (Feb. 3, 2016), [http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A-HRC-31-CRP1\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A-HRC-31-CRP1_en.pdf).

4. See, e.g., *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Judgment, ¶¶ 154–82 (Int'l Crim. Trib. for the former Yugoslavia June 25, 1999).

armed groups might find it difficult to comply with all the protections afforded to detained persons.

This article identifies groups of particularly vulnerable detainees and analyzes the general and special protections that are provided to them under the conventional and customary law of armed conflict,<sup>5</sup> recognizing that the law of non-international armed conflict is less developed than that applicable to international armed conflict (Part II). It then considers the realities of detention in armed conflict and sets out different ways in which these realities can be balanced with the importance of the protections for vulnerable groups (Part III). Next, it analyses additional possibilities found in the law of international armed conflict, namely the release and repatriation of certain groups of detainees, as well as accommodation of detainees in a neutral State, and provides examples of their use in practice (Part IV). The article contends that greater attention should be paid to these possibilities and, with some modification, similar approaches could be adopted in non-international armed conflicts for the benefit of particularly vulnerable detainees.

## II. IDENTIFICATION AND PROTECTION OF PARTICULARLY VULNERABLE DETAINEES

Persons detained for reasons related to an armed conflict are in a vulnerable position, as vulnerability almost inevitably flows from the fact of detention. International humanitarian law (IHL) recognizes that certain categories of persons are particularly vulnerable during times of armed conflict and affords specific protections to those persons. Under the conventional law governing non-international armed conflict, specific reference is made, *inter alia*, to the wounded and sick in Common Article 3 of the Geneva Conventions,<sup>6</sup>

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5. As part of the International Committee of the Red Cross's work on strengthening international humanitarian law protecting persons deprived of their liberty, it identified a number of additional "elements of protection" as a focus for future discussions, beyond those currently provided under existing law. *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, STRENGTHENING INTERNATIONAL HUMANITARIAN LAW PROTECTING PERSONS DEPRIVED OF THEIR LIBERTY: CONCLUDING REPORT pt. VI, at 16–25 (2015), [http://rcrc-conference.org/wp-content/uploads/2015/04/32IC-Concluding-report-on-persons-deprived-of-their-liberty\\_EN.pdf](http://rcrc-conference.org/wp-content/uploads/2015/04/32IC-Concluding-report-on-persons-deprived-of-their-liberty_EN.pdf) [hereinafter STRENGTHENING INTERNATIONAL HUMANITARIAN LAW: CONCLUDING REPORT].

6. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6

as well as to medical and religious personnel,<sup>7</sup> children,<sup>8</sup> women,<sup>9</sup> and persons subject to the criminal process<sup>10</sup> in Additional Protocol II. Further, the conventional law of international armed conflict identifies additional vulnerable groups.<sup>11</sup>

Customary IHL reflects many of the obligations of conventional law to protect particular groups and includes protections for additional categories of persons. According to the International Committee of the Red Cross (ICRC) Customary IHL study, “[t]he elderly, disabled and infirm affected by armed conflict are entitled to special respect and protection,”<sup>12</sup> in both international and non-international armed conflicts.<sup>13</sup>

International humanitarian law also specifically recognizes the particular vulnerability of certain categories of persons in the context of detention, with the conventional law of non-international armed conflict making special mention of the wounded and sick, women, and children.

Other bodies of international law that are applicable in times of armed conflict also recognize the vulnerability of particular groups. Article 11 of the Convention on the Rights of Persons with Disabilities provides, “States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights

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U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Convention (III) Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]; *see also* Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts arts. 5(1)(a), 7, 8, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

7. Additional Protocol II, *supra* note 6, arts. 9, 10.

8. *Id.* art. 4(3).

9. *Id.* art. 5(2)(a).

10. *Id.* art. 6.

11. For example, Article 14 of the Fourth Geneva Convention refers to “hospital and safety zones and localities so organized as to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven.” Geneva Convention IV, *supra* note 6, art. 14. Article 17 provides that

[t]he Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm, and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas.

Geneva Convention IV, *supra* note 6, art. 17.

12. 1: RULES CUSTOMARY INTERNATIONAL HUMANITARIAN LAW r. 138, at 489 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter CIHL].

13. *Id.* at 489.

law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict . . .”<sup>14</sup> Article 29 of the Inter-American Convention on Protecting the Human Rights of Older Persons provides similar protections: “States Parties shall adopt all necessary specific measures to ensure the safety and rights of older persons in situations of risk, including situations of armed conflict, humanitarian emergencies, and disasters, in accordance with the norms of international law, particularly international human rights law and international humanitarian law.”<sup>15</sup> Framed broadly, the provisions cover the situation of detained persons with disabilities and older persons, respectively.

As part of the ICRC’s consultations on strengthening IHL protections for persons deprived of their liberty,<sup>16</sup> it identified additional groups of vulnerable persons. Among those groups were foreign nationals, detainees with infectious diseases or terminal illnesses—specifically HIV-positive detainees, members of minority groups, indigenous persons, and “persons likely to be discriminated against on the basis of sexual orientation.”<sup>17</sup> Thus, even amongst detainees, there are those who have been recognized as particularly vulnerable.

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14. Convention on the Rights of Persons with Disabilities, *opened for signature* Mar. 30, 2007, 2515 U.N.T.S. 3 (entered into force May 3, 2008).

15. Inter-American Convention on Protecting the Human Rights of Older Persons, June 6, 2015, O.A.S.T.S. A-70.

16. *See* STRENGTHENING INTERNATIONAL HUMANITARIAN LAW: CONCLUDING REPORT, *supra* note 5.

17. LEGAL DIVISION, INTERNATIONAL COMMITTEE OF THE RED CROSS, STRENGTHENING INTERNATIONAL HUMANITARIAN LAW PROTECTING PERSONS DEPRIVED OF THEIR LIBERTY: SYNTHESIS REPORT FROM REGIONAL CONSULTATION OF GOVERNMENT EXPERTS 8 (2013) [hereinafter ICRC SYNTHESIS REPORT]; *see also* RAMIN MAHNAD, INTERNATIONAL COMMITTEE OF THE RED CROSS, REGIONAL CONSULTATION OF GOVERNMENT EXPERTS: STRENGTHENING INTERNATIONAL HUMANITARIAN LAW PROTECTING PERSONS DEPRIVED OF THEIR LIBERTY 5 (2013) (reporting the results of discussions held at Pretoria, South Africa); INTERNATIONAL COMMITTEE OF THE RED CROSS, REGIONAL CONSULTATION OF GOVERNMENT EXPERTS: STRENGTHENING INTERNATIONAL HUMANITARIAN LAW PROTECTING PERSONS DEPRIVED OF THEIR LIBERTY (2013) (reporting the results of discussions held at San José, Costa Rica); *see also* ICRC SYNTHESIS REPORT, *supra* at 4.

### A. Wounded and Sick Detainees

Common Article 3 provides that “[t]he wounded and sick shall be collected and cared for.”<sup>18</sup> The obligation to provide for their care “requires that the Parties to the conflict take active steps to ameliorate the medical condition of the wounded and sick.”<sup>19</sup> Further details of the obligations owed to the wounded and sick are found in Additional Protocol II,<sup>20</sup> which expands the basic protections of Common Article 3. Article 5(1)(a) provides that wounded and sick persons who have been deprived of their liberty for reasons relating to the armed conflict are to be treated in accordance with Article 7.<sup>21</sup> In turn, Article 7(1) provides that the wounded and sick “shall be respected and protected.”<sup>22</sup> The word “shall” is the language of obligation. As such, a detaining authority is under an obligation to respect and protect wounded and sick detainees. According to the ICRC, respect means “to spare, not to attack; it is an obligation to abstain from any hostile act,”<sup>23</sup> while to protect means “to come to someone’s defence, to lend help and support . . . to ensure that they are effectively respected, [that is], that no one takes advantage of their weakness in order to mistreat them, steal their belongings, or harm them in any other way.”<sup>24</sup> Thus, detaining authorities are under an obligation not only not to harm wounded and sick detainees, but also to

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18. Geneva Convention I, *supra* note 6, art. 3(2); Geneva Convention III, *supra* note 6, art. 3(2); Geneva Convention IV, *supra* note 6, art. 3(2). *See also* Geneva Convention II, *supra* note 6, art. 3(2) (“The wounded and sick and shipwrecked shall be collected and cared for.”).

19. INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION ¶ 761 (2016) [hereinafter COMMENTARY ON THE FIRST GENEVA CONVENTION].

20. As the 2016 ICRC *Commentary* notes, “In terms of substance, the same kind and quality of medical care is owed under the Geneva Conventions, Additional Protocol II and customary international law.” *Id.* ¶ 762.

21. Additional Protocol II, *supra* note 6, art. 5(1)(a).

22. *Id.* art. 7(1).

23. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 4635 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS]; *see also* COMMENTARY ON THE FIRST GENEVA CONVENTION, *supra* note 19, ¶ 1352, ¶¶ 1353–59 (providing more general discussion pertaining to this obligation).

24. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 23, ¶ 4635; *see also* COMMENTARY ON THE FIRST GENEVA CONVENTION, *supra* note 19, ¶ 1352 (noting that to protect means “to take (pro)active measures”), ¶¶ 1360–66 (discussing the meaning of protection more generally).

protect them from harm from others, including, for example, civilians not associated with the detaining power.

Article 7(2) of Additional Protocol II provides that “in all circumstances” the wounded and sick “shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.”<sup>25</sup> The language of Article 7(2) is again one of obligation (“shall receive”). However, the provision does not require the unattainable. It recognizes that it might not be possible to provide the medical care required by the condition of the wounded detainee given the situation. Two such examples include a lack of medical equipment at the forward operating base at which the individual is temporarily present or the length of time needed for necessary medical personnel to arrive.<sup>26</sup> The standard of medical care provided might also be lower than that which applies during peacetime.<sup>27</sup> Nonetheless, the importance and strength of the obligation is clear from the choice of language: “fullest extent practicable,” “least possible delay,” and “required by their condition.” The requirement is clear: detainees must receive the best possible medical care as quickly as the circumstances permit.

Moreover, medical care and attention cannot be contingent on good behavior on the part of the detainee. Equally, prior poor behavior in detention cannot lead to lack of medical attention. Nor can receiving medical treatment be subject to providing answers during questioning.

### B. *Women Detainees*

There are a number of factors that make women particularly vulnerable in detention. Generally, there are fewer women detainees than men, and consequently, women are often detained in facilities designed to house only men, raising safety and privacy issues.<sup>28</sup> Places of detention are often smaller, leading to overcrowding and unhygienic conditions.<sup>29</sup> Detention personnel are

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25. Additional Protocol II, *supra* note 6, art. 7(2).

26. *See* COMMENTARY ON THE FIRST GENEVA CONVENTION, *supra* note 19, ¶ 763.

27. Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Judgment, ¶ 182 (Int'l Crim. Trib. for the former Yugoslavia June 25, 1999).

28. CHARLOTTE LINDSEY-CURTET, FLORENCE TERCIER HOLST-RONESS & LETITIA ANDERSON, INTERNATIONAL COMMITTEE OF THE RED CROSS, ADDRESSING THE NEEDS OF WOMEN AFFECTED BY ARMED CONFLICT 119 (2004).

29. CHARLOTTE LINDSEY, INTERNATIONAL COMMITTEE OF THE RED CROSS, WOMEN FACING WAR 179 (2001).



often men, which raises both safety and privacy concerns, particularly when women are using washing facilities and being searched.<sup>30</sup> And the unfortunate reality is that female detainees are often subject to sexual violence.<sup>31</sup> To address these concerns, women detainees benefit from specific protections.

Under customary IHL, “[t]he specific protection, health and assistance needs of women affected by armed conflict must be respected.”<sup>32</sup> This includes women detainees. To afford women greater protection, including from abuse and sexual violence, both conventional and customary IHL provide that women deprived of their liberty are to be held in quarters separate from those of men,<sup>33</sup> except where families are accommodated as family units.<sup>34</sup> This requirement also offers greater privacy for women, and for men. Further, women detainees are to be under the direct supervision of women,<sup>35</sup> another provision of the law intended to afford women greater protection. In conventional law, but seemingly not customary law, these obligations are subject to the capabilities of the detaining authorities.<sup>36</sup>

In addition to the specific protections, women continue to benefit from the general protections afforded to all detainees. These general protections

30. *Id.* at 169.

31. LINDSEY-CURTET, HOLST-RONESS & ANDERSON, *supra* note 28, at 125 (“In detention, it is the shocking reality that women nearly always suffer sexual violence and men often do.”); *see also* Office of the United Nations High Commissioner for Human Rights, *Conflict-Related Sexual Violence in Ukraine (14 March 2014 to 31 January 2017)*, ¶¶ 65–77, U.N. Doc. A/HRC/34/CRP.4 (Mar. 16, 2017), [http://www.ohchr.org/Documents/Countries/UA/ReportCRSV\\_EN.pdf](http://www.ohchr.org/Documents/Countries/UA/ReportCRSV_EN.pdf).

32. CIHL, *supra* note 12, r. 134, at 475.

33. According to the *Commentary on the Additional Protocols*, the requirement is “an essential element of what must be done to comply with the prohibition of ‘outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault’” set out in Article 4(2)(e) of Additional Protocol II. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 23, ¶ 4583. The Customary IHL study notes that “the purpose of this rule is to implement the specific protection accorded to women.” CIHL, *supra* note 12, at 432.

34. Additional Protocol II, *supra* note 6, art. 5(2)(a); CIHL, *supra* note 12, r. 119, at 431.

35. Additional Protocol II, *supra* note 6, art. 5(2)(a); CIHL, *supra* note 12, r. 119, at 431.

36. The words are absent from the formulation of the customary rule. However, the commentary on the customary rule notes that

It is the ICRC’s experience that separation of men and women in detention generally occurs. If sometimes only minimal separation is provided, this is not because of a lack of acceptance of this rule but rather a result of limited resources available to the detaining authorities. Additional Protocol II, in particular, provides that this rule must be respected by those who are responsible for the internment or detention ‘within the limits of their capabilities’.

CIHL, *supra* note 12, at 432–33.

must be interpreted in a manner that has due regard for the particular needs of women. Like all detainees, women are to be “afforded safeguards as regards health and hygiene.”<sup>37</sup> This includes health care services that are relevant to all detainees, such as access to a general practitioner, as well as those services that are specific to women, such as the ability to consult a gynecologist. The same is true of hygiene needs. Female detainees must have access to products that are relevant to all detainees (e.g., soap, toothpaste), but also those that are specific to women’s needs, such as sanitary products. Only by recognizing the different needs of men and women can there be compliance with the obligation to afford “safeguards as regards health and hygiene to detainees.”<sup>38</sup> As Pictet notes, “[a]bsolute equality might easily become injustice if applied without regard to considerations such as state of health, age, sex, rank or professional aptitude.”<sup>39</sup>

Women detainees, like all detainees, benefit from the more general obligation of humane treatment, and thus are “entitled to respect for their person, honour and convictions and religious practices.”<sup>40</sup> In all cases, women benefit from treatment that is as favorable as that granted to men.<sup>41</sup> Thus, as an example, women detainees cannot be denied access to common areas such as canteens and communal spaces.

A particular issue of concern is searches of women detainees. Article 97 of the Fourth Geneva Convention provides that “[a] woman internee shall not be searched except by a woman,”<sup>42</sup> but there is no similar rule in the law of non-international armed conflict. Notwithstanding the absence of such a rule, some States require that, where possible, searches of female detainees

37. Additional Protocol II, *supra* note 6, art. 5(1)(b).

38. *Id.*

39. COMMENTARY TO GENEVA CONVENTION III RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 154 (Jean Pictet ed., 1960) [hereinafter COMMENTARY TO GENEVA CONVENTION III]; see also Noëlle Quénivet, *Special Rules on Women, in THE 1949 GENEVA CONVENTIONS: A COMMENTARY* 1271, 1272 (Andrew Clapham, Paola Gaeta & Marco Sassòli eds., 2015).

40. Additional Protocol II, *supra* note 6, art. 4(1).

41. This rule follows from Common Article 3 of the Geneva Conventions and Article 4(1) of Additional Protocol II. See Geneva Convention I, *supra* note 6, art. 3(1); Geneva Convention II, *supra* note 6, art. 3(1); Geneva Convention III, *supra* note 6, art. 3(1); Geneva Convention IV, *supra* note 6, art. 3(1); Additional Protocol II, *supra* note 6, art. 4(1). Further, a specific statement to this effect is found in Article 14 of the Third Geneva Convention. See Geneva Convention III, *supra* note 6, art. 14 (“Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men.”).

42. Geneva Convention IV, *supra* note 6, art. 97.

be conducted by women.<sup>43</sup> This practice assists with the required respect for their person.

Of course, women detainees are not a homogenous category; different groups of women have different needs. As recognized by the Fourth Geneva Convention, pregnant women will require supplementary food and water;<sup>44</sup> they will also have specific prenatal, obstetric, and postnatal medical needs. Pregnant women are included within the definition of the wounded and sick in Additional Protocol I,<sup>45</sup> a definition that applies equally in non-international armed conflicts.<sup>46</sup> Accordingly, pregnant women who are detained benefit from the protections afforded to wounded and sick detainees, including “to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition.”<sup>47</sup> Appropriate plans must also be made for childbirth. As with pregnant women, women who are nursing will require supplementary food and water, and may need milk powder, feeding utensils, and sterilization facilities. Pregnant and nursing women

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43. See, e.g., Djibouti, Manuel on International Humanitarian Law and Human Rights Applicable to the Work of the Police Officer (2004) (“Physical searches must be carried out by female officials.”). The U.S. manual on detainee operations provides that “[u]nless militarily infeasible, female detainees must be searched by female service members.” Chairman of the Joint Chiefs of Staff, JP 3-63, Detainee Operations IV-2 (2014). The U.S. DoD *Law of War Manual* states, “It is appropriate for female detainees to be searched by female personnel. This practice helps reduce the risk of accusations of indecent behavior.” OFFICE OF THE GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL § 8.3.1.1 (rev. ed., Dec. 2016). See generally *Rule 119: Accommodation for Women Deprived of Their Liberty*, ICRC: IHL DATABASE CUSTOMARY IHL, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule119](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule119).

44. Geneva Convention IV, *supra* note 6, art. 89. Article 89 provides that “[e]xpectant and nursing mothers . . . shall be given additional food, in proportion to their physiological needs.”

45. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 8(a), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]

For the purposes of this Protocol:

(a) “wounded” and “sick” mean persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, new-born babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility

46. See SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 274 (2012); COMMENTARY ON THE FIRST GENEVA CONVENTION, *supra* note 19, ¶ 738.

47. Additional Protocol II, *supra* note 6, art. 7(2).

might also require “adjustments in the organization and equipment of their accommodation.”<sup>48</sup>

In the course of the ICRC’s work on strengthening IHL’s protection of persons deprived of their liberty, the ICRC carried out consultations with government experts, which identified a number of elements of protection that required further discussion concerning women. These elements fell under the categories of separation of accommodation and supervision;<sup>49</sup> health care and hygiene;<sup>50</sup> pregnant and nursing women;<sup>51</sup> women accompanied or visited by children;<sup>52</sup> and preferential release of women from detention.<sup>53</sup> Some elements reflect existing law; while others do not, but are designed to increase the protection of detained women. Finally, international human rights law provides additional protections for women detainees.<sup>54</sup>

### C. Child Detainees

As with women, there are a number of factors that make child detainees particularly vulnerable. Children are often held in police cells and prisons, rather than juvenile detention facilities, and with adults, placing them at

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48. COMMENTARY ON THE FIRST GENEVA CONVENTION, *supra* note 19, ¶ 577.

49. Specifically, “women’s accommodation relative to men” and “considerations related to supervision of women in detention.” STRENGTHENING INTERNATIONAL HUMANITARIAN LAW: CONCLUDING REPORT, *supra* note 5, at 43.

50. Health and hygienic needs included “the availability and quality of gender specific health-care services,” “preventive health measures of particular relevance to women,” the “gender of care providers,” “persons who may be present during medical examinations” and “women’s specific hygiene needs.” *Id.*

51. Accommodations included “medical and nutritional advice for pregnant and breastfeeding women,” “health conditions in the detention environment for pregnant women, babies, children and breastfeeding mothers,” “medical and nutritional needs of women who have just given birth,” “breastfeeding in detention,” “limitations on close confinement and disciplinary segregation of pregnant women, women with infants and breastfeeding women,” and “limitations on use of restraints during and after labour.” *Id.*

52. Such accommodations included “factors for determining whether children remain with their detained parents,” “suitability of treatment and environment for children accompanying parents in detention,” “health care for children accompanying parents in detention,” “factors determining when children are to be separated from their detained parents,” “conditions for removing a child accompanying a parent from a detention facility,” and “visits by children to detained parents.” *Id.* at 43–44.

53. *Id.* at 44.

54. See especially G.A. Res. 65/229, United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (The Bangkok Rules) (Dec. 21, 2010).

“greater risk of neglect and abuse.”<sup>55</sup> They are denied access to education, putting them behind their peers once they are released, while other age-specific services are “often inadequate or non-existent.”<sup>56</sup> Some reports find that children are more likely to be tortured than are adults.<sup>57</sup>

International humanitarian law affords specific protections to detained children under the age of fifteen. Article 4(3) of Additional Protocol II provides that “[c]hildren shall be provided with the care and aid they require” and sets out a list of specific measures to this end.<sup>58</sup> These measures also apply to children who take a direct part in hostilities and are captured.<sup>59</sup> Article 4 in its entirety is generally considered to reflect customary international law.<sup>60</sup> The ICRC Customary IHL study concluded that “[c]hildren affected by armed conflict are entitled to special respect and protection” in both international and non-international armed conflict.<sup>61</sup>

The general rule that children are to receive the care and aid they require is not limited to the measures set out in Article 4(3)(a)–(e), rather, the rule more broadly requires that provision be made for their particular needs. Some of these needs are addressed in provisions of the law of international armed conflict. The Fourth Geneva Convention provides that children under the age of fifteen “shall be given additional food, in proportion to their physiological needs,”<sup>62</sup> and that children and young people are to be given “opportunities for physical exercise, sports and outdoor games.”<sup>63</sup> These needs are equally present in non-international armed conflicts. It also follows from the general rule that children are to be held in quarters separate from

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55. See INTERNATIONAL COMMITTEE OF THE RED CROSS, CHILDREN AND DETENTION 4 (2014).

56. *Id.*

57. See, e.g., HUMAN RIGHTS WATCH, EXTREME MEASURES: ABUSES AGAINST CHILDREN DETAINED AS NATIONAL SECURITY THREATS (2016).

58. Additional Protocol II, *supra* note 6, art. 4(3).

59. *Id.* art. 4(3)(d).

60. See, e.g., U.N. Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, ¶ 14, U.N. Doc. S/2000/915 (Oct. 4, 2000); *Prosecutor v. Akayesu*, Case No. ICTR-96-4, Judgment, ¶ 610 (Sept. 22, 1998); CIHL, *supra* note 12, pt. V, at 299–491.

61. CIHL, *supra* note 12, r. 135, at 479.

62. Geneva Convention IV, *supra* note 6, art. 89.

63. Article 94 provides that “[i]nternees shall be given opportunities for physical exercise, sports and outdoor games. For this purpose, sufficient open spaces shall be set aside in all places of internment. Special playgrounds shall be reserved for children and young people.” *Id.* art. 94.

those of adults, except where families are accommodated as family units.<sup>64</sup> This arrangement serves to protect children from abuse, including sexual violence. It may be that, for similar reasons, girls should be held separately from boys. At the same time, children must not be isolated. Accordingly, consideration should be given to mixing detainees at certain times and under appropriate supervision. Some States further distinguish juvenile detainees—individuals between the ages of fifteen and seventeen—and require that they be accommodated separately from child and adult detainees.<sup>65</sup>

One of Article 4's special protections is that children "shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care."<sup>66</sup> Therefore, children are to continue to benefit from an education despite their detention.<sup>67</sup> This requirement is of particular importance to those in long-term detention, but the obligation is not limited to such children, as the duration of the detention will not be apparent at the outset.

Certain categories of children require additional care and aid. For example, girls have the needs of children, such as education, as well as the needs of females generally, for example, hygiene needs and access to gynecological care.<sup>68</sup> And, as with women detainees, as part of the ICRC's consultations, a number of elements of protection relating to children were identified as warranting further discussion, namely: notification of detention, family contact,

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64. This is a component of the "special respect and protection due to children affected by armed conflict." See CIHL, *supra* note 12, at 481. It has been found to be a rule of customary IHL. See *id.* r. 120, at 433. The requirement of separating children from adults is not found in Additional Protocol II, an omission described by some commentators as "astonishing." MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS, COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949*, at 647 (1982).

65. Development, Concepts and Doctrine Centre, United Kingdom Ministry of Defence, JDP 1-10, *Captured Persons (CPERS)* ¶ 229 (3d ed. 2015) [hereinafter JDP 1-10].

66. Additional Protocol II, *supra* note 6, art. 4(3)(a).

67. JDP 1-10, *supra* note 65, ¶ 233 ("The regime for juveniles and children should emphasise education and skills training in keeping with relevant cultural and religious precepts.").

68. See *supra* text accompanying notes 37–39; see also note 50.

access to counsel,<sup>69</sup> accommodation,<sup>70</sup> education,<sup>71</sup> nutrition and exercise,<sup>72</sup> juvenile female detainees,<sup>73</sup> children left unaccompanied,<sup>74</sup> and release and alternatives to detention.<sup>75</sup> Finally, international human rights law provides additional protections for child detainees.<sup>76</sup>

#### D. Detained Persons with Disabilities

Additional Protocol I provides that the “‘wounded’ and ‘sick’ mean persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility.”<sup>77</sup> As noted previously, this definition applies in non-international armed conflicts. Accordingly, many persons with disabilities fall within the definition of the wounded and sick for purposes of the application of IHL. As such, they benefit from the guarantees discussed above, including that they be respected, protected, treated humanely, and “receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition.”<sup>78</sup>

For its part, Article 30 of the Third Geneva Convention provides expressly that “[s]pecial facilities shall be afforded for the care to be given to

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69. More specifically, the ICRC included “notification of detained children’s family members,” “maintenance of family contact for detained children,” and “access to counsel for detained children.” STRENGTHENING INTERNATIONAL HUMANITARIAN LAW: CONCLUDING REPORT, *supra* note 5, at 44.

70. Here, the ICRC clarified “accommodation of children relative to adults.” *Id.*

71. The education requirement included “quality and content of education of children in detention” and “access for detained children to schools within or outside detention facilities.” *Id.* at 45.

72. The nutrition and exercise requirement included “special nutritional needs of children,” “special recreational and exercise needs of children,” and “recreational and exercise facilities for children.” *Id.*

73. For juvenile female detainees, the ICRC included “specific needs of juvenile female detainees” and “specific needs of pregnant juvenile female detainees.” *Id.*

74. For children left unaccompanied, the ICRC included “support for dependents of detainees” and “custody of children of detainees left unsupervised.” *Id.* at 46.

75. The ICRC included “alternatives to detention for children” and “conditional release of children.” *Id.*

76. *See especially* Convention on the Rights of the Child art. 37, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990); *see also* G.A. Res. 40/33, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) (Nov. 29, 1985).

77. Additional Protocol I, *supra* note 45, art. 8(a).

78. Additional Protocol II, *supra* note 6, art. 7.

the disabled, in particular to the blind, and for their rehabilitation, pending repatriation.”<sup>79</sup>

Persons with disabilities also benefit from the general protections afforded to detainees. Additionally, due regard must be had for their particular needs, requiring that some of the general protections afforded to all detainees be tailored to the specific situation of those with disabilities. Consequently, the obligation to afford detainees “safeguards as regards health and hygiene”<sup>80</sup> means that certain washroom facilities might need to be handicap accessible, to include ramps and handrails. Some detainees might require assistance with feeding, need longer to eat, or require certain types of nutrition in order to fulfill the obligation to provide food.<sup>81</sup> Detainees with mobility issues might require assistance in order to leave their cell. Orders and instructions might have to be given in different mediums in order to reach visually or hearing-impaired detainees. Assistance might need to be provided to detainees with disabilities in the case of an evacuation.<sup>82</sup>

Likewise, under customary IHL, the disabled who are “affected by armed conflict are entitled to special respect and protection.”<sup>83</sup> For its part, the Office of the UN High Commissioner for Human Rights observed, “all persons with disabilities who have been deprived of their liberty should have access to reasonable accommodation and appropriate measures to ensure that they can live independently and participate fully in all aspects of life within their places of detention.”<sup>84</sup> This is not to prioritize those with disabilities, but to put them in the same position as detainees who do not have disabilities.

#### *E. Older Detainees*

Older persons benefit from the protections that are afforded to all detainees, which, like each group of the particularly vulnerable, must be tailored to their

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79. Geneva Convention III, *supra* note 6, art. 30.

80. Additional Protocol II, *supra* note 6, art. 5(1)(b).

81. *Id.*

82. *Id.* art. 5(2)(c).

83. CIHL, *supra* note 12, r. 138, at 489.

84. Office of the United Nations High Commissioner for Human Rights, *Thematic Study on the Rights of Persons with Disabilities under Article 11 of the Convention on the Rights of Persons with Disabilities, on Situations of Risk and Humanitarian Emergencies*, ¶ 48, UN.Doc. A/HRC/31/30 (Nov. 30, 2015).



specific needs.<sup>85</sup> As an example, the obligation to protect detainees “against the rigours of the climate”<sup>86</sup> might necessitate additional clothing and blankets for older persons. The requirement to provide food<sup>87</sup> must be tailored to older detainees to fulfill nutritional requirements. Affording detainees “safeguards as regards health and hygiene”<sup>88</sup> means that washroom facilities have to be accessible to older persons and might require special fixtures such as handrails. Indeed, as a matter of customary IHL, “[t]he elderly . . . affected by armed conflict are entitled to special respect and protection.”<sup>89</sup> At a minimum, the requisite standard for the protections and safeguards extended to them are to be provided “to the same extent as [to] the local civilian population,”<sup>90</sup> specifically, older persons in the local civilian population.

### III. BALANCING STANDARDS WITH THE REALITIES OF DETENTION

#### A. *The Importance of Protections*

The various rules for the protection of groups of particularly vulnerable detainees are of paramount importance. If women detainees are quartered with men, they are at greater risk of violence and abuse. Without access to education, children detained for several years can end up without an education. In the absence of accessible facilities, disabled and older persons might be confined to their cells. Without communications in appropriate mediums, detainees with disabilities might not be aware of their rights and obligations. At the same time, the practicalities of detention in non-international armed conflicts reveal that it is not always possible to comply with all of these rules in all situations.

#### B. *The Realities of Detention*

In extraterritorial non-international armed conflicts, where one State intervenes in a conflict occurring on the territory of another State in support of

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85. COMMENTARY ON THE FIRST GENEVA CONVENTION, *supra* note 19, ¶ 577 (“The age of a person deprived of liberty may require appropriate treatment, for example in terms of the kind of food or medical care provided.”).

86. Additional Protocol II, *supra* note 6, art. 5(1)(b).

87. *Id.*

88. *Id.*

89. CIHL, *supra* note 12, r. 138, at 489.

90. Additional Protocol II, *supra* note 6, art. 5(1)(b).

that State, the intervening State and territorial State are situated differently. The intervening State may have a limited number of personnel and will not necessarily have “control over an easily accessible rear area to which they could quickly evacuate detainees, allowing them to promptly implement the full range of obligations related to conditions of detention.”<sup>91</sup> For example, it might be difficult for an intervening State to provide access to education to child detainees, especially education that is consistent with “local standards or expectations.”<sup>92</sup>

Even in non-international armed conflicts confined to a single State territory, it might be impossible to comply with the full detail of the rules in all detention facilities. The detention facilities might not be set up to take into account the specific needs of vulnerable persons. In this regard, appropriate planning and training will go a long way towards assuring compliance with the obligations.<sup>93</sup> Still, it is not always simply a question of adequate preparation. For example, the number of individuals detained might be substantially greater than could reasonably be anticipated. And, depending on the type of vulnerability in question, it may be impossible to render a facility fully accessible to particular detainees.

While unexpected outcomes will challenge the ability of detaining authorities to comply with the law, requirements will also vary depending on the type of detention facility. Forward operating bases, transit centers, ad hoc detention facilities, and long-term detention facilities cannot be held to the same standard.<sup>94</sup> As an example, the requirement of separate quarters for women and for children is not without its difficulties. In certain detention facilities, the layout may be such that it is not possible to accommodate men, women, boys, and girls in separate quarters. In situations where a limited number of women have been detained compared to the number of men,

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91. ICRC SYNTHESIS REPORT, *supra* note 17, at 5.

92. RAMIN MAHNAD, INTERNATIONAL COMMITTEE OF THE RED CROSS, THEMATIC CONSULTATION OF GOVERNMENT EXPERTS ON CONDITIONS OF DETENTION AND PARTICULARLY VULNERABLE DETAINEES: STRENGTHENING INTERNATIONAL HUMANITARIAN LAW PROTECTING PERSONS DEPRIVED OF THEIR LIBERTY 57 (2015) [hereinafter THEMATIC CONSULTATION REPORT].

93 *Id.* at 49.

94. *Id.* at 53. Along similar lines, the Eritrea-Ethiopia Claims Commission found that medical care provided immediately following capture could not be expected to meet the same level as that provided following evacuation to a longer-term prisoner of war camp. *See* Partial Award: Prisoners of War – Ethiopia’s Claim 4 (Eri. v. Eth.), 26 R.I.I.A. 73, 96 (Eri.-Eth. Claims Comm’n 2003); Partial Award: Prisoners of War – Eritrea’s Claim 17, 26 R.I.I.A. 23, 45 (Eri.-Eth. Claims Comm’n 2003).

women have been detained in small sections of men's prisons or detention centers where sanitary and other facilities have proven insufficient.<sup>95</sup> In conflicts in which few women, perhaps even a single female, are detained, the requirement of separate quarters might lead to isolation. In that situation, separate sleeping facilities and washroom facilities rather than entirely separate quarters might provide better protection and the choice could be left to the detained persons concerned. In some circumstances, the requirement of direct supervision of women detainees by women might prove impossible due to the absence of female supervisory personnel. While female personnel can be brought in to certain detention centers, it might be difficult to do so in others. Even in long-term detention facilities, the lack of female supervisors and guards has led to women detainees being confined to their cells for extended periods.<sup>96</sup> Likewise, there might not be health care resources for pregnant women or resources for persons with disabilities at a transit facility. And, although a transit center or an ad hoc facility may have fewer resources, in practice some of these facilities can end up being semi-permanent and long-term, with individuals being detained in them for lengthy periods.

The capabilities of parties to a non-international armed conflict also vary considerably. Many non-State armed groups do not control territory and have limited resources and capabilities. Some groups detain individuals, but move their detainees from location to location to lessen the chance of being captured.<sup>97</sup> These groups would find it difficult to comply with the obligations of providing protections to vulnerable groups in detention. By contrast, other non-State armed groups have substantial resources and capabilities, control significant portions of territory, and have long-term detention facilities. These groups would be able to comply with many of the standards discussed above, such as detaining women and men in separate quarters and providing education to child detainees. Still other non-State armed groups have intermediate levels of capability, benefitting from some level of resources and control of buildings, villages, or certain areas of territory at night, with the State controlling that same territory during the day. This varying level of capability and resources on the part of a party to the conflict necessarily affects the standards expected of them.

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95. Charlotte Lindsey, *Women and War: The Detention of Women in Wartime*, 83 INTERNATIONAL REVIEW OF THE RED CROSS 505, 509 (2001).

96. *Id.* at 512.

97. See SIVAKUMARAN, *supra* note 46, at 297.

### C. Finding a Balance

Without question, the protections, both general and specific, afforded to vulnerable groups of detainees are important. At the same time, the realities of detention mean there will be circumstances in which the full panoply of protections required by the law cannot always be provided. Moving forward, there are a number of ways to resolve, or at least lessen this tension.

One approach is to identify certain minimum rules that would be applicable to all detainees at all times. Together with these core minimum rules, additional rules would be applicable depending on the capabilities of the party to the conflict. Aspects of this approach already are found in Additional Protocol II. Article 5(1) contains the core of the protections afforded to detained persons, indicating that the listed provisions “shall be respected as a minimum.”<sup>98</sup> Beyond these minimum rules, other obligations exist, but they are dependent on the capacity of the detaining entity. Article 5(2) provides that “[t]hose who are responsible for the internment or detention of the persons referred to in paragraph 1 shall also, *within the limits of their capabilities*, respect the following provisions.”<sup>99</sup> A similar approach could be taken for the protections to be afforded to particularly vulnerable groups of detainees, although the issue of which rules are to be considered core minimum rules and which are to be considered applicable depending on the capability of the detaining party is a delicate one.<sup>100</sup>

A second approach is to set out a general standard, supplemented by more detailed rules linked to that general standard. An example is conventional law relating to the wounded and sick. Common Article 3 provides without more: “[t]he wounded and sick shall be collected and cared for.”<sup>101</sup> Additional Protocol II puts flesh on these bones, referring to respect and protection for the wounded and sick, their humane treatment, and the provision of medical care;<sup>102</sup> searching for and collection of the wounded and

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98. Additional Protocol II, *supra* note 6, art. 5(1).

99. *Id.* art. 5(2) (emphasis added).

100. The Additional Protocol II requirement of women being held in quarters separate from men is found in the list of provisions that are dependent on the capability of the detaining authority. *Id.* art. 5(2)(a). By contrast, in Article 8(2)(d) of the ICRC Draft of Additional Protocol II, it was in the list of minimum core rules. *See* 1 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA (1974–1977) pt. 3, at 35 (1978).

101. *See supra* note 18 and accompanying text.

102. Additional Protocol II, *supra* note 6, art. 7.

sick;<sup>103</sup> and specific protection for medical and religious personnel and medical units and transports.<sup>104</sup> Indeed, in 1969, the ICRC suggested “[g]uerrillas and their opponents should conform to the same rules,” but “[t]he more restricted facilities of the former should . . . be taken into account and general principles established which both Parties could apply.”<sup>105</sup> The same approach could be taken in developing a general standard and implementing rules for particularly vulnerable detainees. For example, as we have seen, in customary IHL there is a general rule that “[t]he elderly, disabled and infirm affected by armed conflict are entitled to special respect and protection.”<sup>106</sup> The several specific measures that flow from this general rule were discussed above, including making washroom facilities handicap accessible for persons with disabilities and meeting the dietary needs of the elderly. There is usually little difficulty with the general rule by virtue of its broad language; it is at the level of the detailed rules that difficulties arise, namely, obtaining agreement on the concrete measures that flow from the “special respect and protection” standard.

A third approach is to take into account the capacity of the actor, as well as the broader context, in the formulation of the particular rules. Such an approach already exists in the conventional law of non-international armed conflict. Under this approach, a rule could provide that “all appropriate steps shall be taken” to respect and protect particularly vulnerable groups of detainees.<sup>107</sup> Alternative language could include “to the fullest extent practicable”<sup>108</sup> or “all possible measures,”<sup>109</sup> as each of these formulations appear in Additional Protocol II. The references to appropriateness, practicability, and possibility cater to the range of situations, such as forward operating bases, ad hoc venues, and long-term detention facilities. While lacking specificity, the inclusion of words such as “all” and “fullest” illustrate the strength of the obligation.

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103. *Id.* art. 8.

104. *Id.* arts. 9–12.

105. INTERNATIONAL COMMITTEE OF THE RED CROSS, REAFFIRMATION AND DEVELOPMENT OF THE LAWS AND CUSTOMS APPLICABLE IN ARMED CONFLICTS: REPORT SUBMITTED BY THE INTERNATIONAL COMMITTEE OF THE RED CROSS 118 (1969).

106. CIHL, *supra* note 12, r. 138, at 489. *See also supra* notes 12–13 and accompanying text.

107. *See* Additional Protocol II, *supra* note 6, art. 4(3)(b) (stating “all appropriate steps shall be taken”).

108. *See id.* art. 7(2) (stating “to the fullest extent practicable”).

109. *See id.* arts. 8, 17 (stating “all possible measures”).

Even in situations in which it is impossible to follow the letter of the law, it is often possible to conform to its object and purpose. As an example, if the structure and layout of an ad hoc detention facility is such that women cannot be held in separate quarters from men, provision can be made for separate sleeping quarters and washroom facilities.<sup>110</sup> As the object and purpose of the rule is to protect women detainees and afford them privacy, this can be accomplished through sufficient separation “to prevent any interference with the enjoyment of the full range of protections applicable to conditions of detention.”<sup>111</sup> If there is an insufficient number of female guards to provide complete supervision of women detainees, women could carry out those matters requiring direct contact with women detainees.<sup>112</sup> Alternatively, additional supervision could be provided as a temporary measure.<sup>113</sup>

This focus on the object and purpose of the rule is found in other areas of IHL. For example, in an international armed conflict an examination is required prior to burial or cremation of the dead who have fallen into the hands of the enemy as sick or wounded.<sup>114</sup> If possible, it is to be a medical examination, but if it is not possible, an examination “akin to a medical examination” may be undertaken “by a person who has medical training but who is not a qualified medical examiner.”<sup>115</sup>

As discussed above, a number of different approaches can help reconcile the needs of particularly vulnerable detainees with the realities of detention. In some instances, however, none of the approaches will be able to strike the necessary balance. Certain protections might fall within the norms that are subject to the capabilities of the detaining authority, but that authority might not have the ability to provide the protection needed. Thus, the detaining authority may be in compliance with the law, but still lack the capability to provide adequate protection to the detainee. Of course, such compliance provides little comfort to the individual detainee, as his or her particular needs remain unmet. Equally, some of the protections afforded to particularly vulnerable groups stem from safeguards relating to health and hygiene. Such protections are not dependent on the capacity of the detaining

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110. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 23, ¶ 4583. Article 25 of the Third Geneva Convention requires “separate dormitories” for women prisoners of war rather than separate quarters. Geneva Convention III, *supra* note 6, art. 25.

111. THEMATIC CONSULTATION REPORT, *supra* note 92, at 47.

112. *Id.*

113. *Id.*

114. Geneva Convention I, *supra* note 6, art. 17.

115. COMMENTARY ON THE FIRST GENEVA CONVENTION, *supra* note 19, ¶ 1673.

authority and are applicable at all times to all detainees, but, in practice, nonetheless might be beyond the detaining authority's capabilities.

#### IV. ADDITIONAL POSSIBILITIES

The law of international armed conflict provides a number of additional possibilities that can help resolve the tension between the needs of particularly vulnerable groups of detainees and the realities of detention. Two such possibilities are repatriation and accommodation in a neutral country. Although used only rarely, these processes warrant greater attention, as similar approaches could be used in non-international armed conflicts.

##### A. Release and Repatriation

###### 1. Wounded and Sick Detainees

The Third Geneva Convention envisages the repatriation of certain categories of prisoners of war. Article 109 provides that “[p]arties to the conflict are bound to send back to their own country, regardless of number or rank, seriously wounded and seriously sick prisoners of war, after having cared for them until they are fit to travel.”<sup>116</sup> This language —“the Parties to the conflict are bound to send back”—obliges the parties to repatriate the relevant prisoners of war.<sup>117</sup> It is not contingent on reciprocity. The obligation to repatriate is subject only to the prohibition on the repatriation of an individual prisoner of war against his or her will. Further, Article 110 defines those who are seriously wounded and sick, thus subject to repatriation, as follows:

The following shall be repatriated direct:

- (1) Incurably wounded and sick whose mental or physical fitness seems to have been gravely diminished.
- (2) Wounded and sick who, according to medical opinion, are not likely to recover within one year, whose condition requires treatment and whose mental or physical fitness seems to have been gravely diminished.
- (3) Wounded and sick who have recovered, but whose mental or physical fitness seems to have been gravely and permanently diminished.<sup>118</sup>

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116. Geneva Convention III, *supra* note 6, art. 109.

117. The Pictet *Commentary* notes that the “wording of the provision is imperative.” COMMENTARY TO GENEVA CONVENTION III, *supra* note 39, at 509.

118. Geneva Convention III, *supra* note 6, art. 110.

A Model Agreement concerning Direct Repatriation and Accommodation in Neutral Countries of Wounded and Sick Prisoners of War is annexed to the Third Geneva Convention.<sup>119</sup> The Model Agreement builds on Article 110 by providing a more detailed list of the medical conditions for which there is to be direct repatriation.<sup>120</sup> For each particular conflict, the Model Agreement will likely need to be supplemented by special agreements detailing the practical procedures to be followed. Nonetheless, the Model Agreement represents a “firm basis for negotiation” between the parties to the conflict and can apply in the absence of a special agreement.<sup>121</sup>

The examination of the wounded and sick and “all appropriate decisions” regarding the wounded and sick in relation to repatriation is left to Mixed Medical Commissions.<sup>122</sup> Each commission is composed of three members, two of whom belong to neutral States and are appointed by the ICRC, with the third appointed by the detaining power.<sup>123</sup> One of the neutral members chairs the commission.<sup>124</sup> If possible, one of the neutral members is to be a physician and the other a surgeon.<sup>125</sup> Decisions of the commission are made by a majority vote.<sup>126</sup>

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119. Geneva Convention III, *supra* note 6, Annex I: Model Agreement Concerning Direct Repatriation and Accommodation in Neutral Countries of Wounded and Sick Prisoners of War Part I; *see also* COMMENTARY TO GENEVA CONVENTION III, *supra* note 39, at 650.

120. Geneva Convention III, *supra* note 6, Annex I, Part I: Principles for Direct Repatriation and Accommodation in Neutral Countries.

121. COMMENTARY TO GENEVA CONVENTION III, *supra* note 39, at 650.

122. Geneva Convention III, *supra* note 6, art. 112; *see also* COMMENTARY TO GENEVA CONVENTION III, *supra* note 39, at 525.

123. Geneva Convention III, *supra* note 6, Annex II: Regulations Concerning Mixed Medical Commissions arts. 1, 2. Under Article 3, the neutral members must be “approved by the Parties to the conflict concerned.” *See supra*, art. 3.

124. *Id.* Annex II, art. 1.

125. *Id.* Annex II, art. 6.

126. *Id.* Annex II, art. 10. Article 10 seems to limit the role of Mixed Medical Commissions, providing that the commissions “shall propose repatriation, rejection, or reference to a later examination.” *Id.* However, Article 112 of the Third Geneva Convention is broader in scope as it provides for the commissions to take “all appropriate decisions.” *Id.* art 112. The commissions take “decisions” rather than make “proposals” to the detaining power, as prescribed by Article 12 of the Regulations, which provides that “[t]he Detaining Power shall be required to carry out the decisions of the Mixed Medical Commissions within three months of the time when it receives due notification of such decisions.” *Id.* Annex II, art. 12. Article 112 is also broader in that one of the decisions of the commission might be for accommodation of the wounded and sick prisoner of war in a neutral State; a possibility not



Mixed Medical Commissions are to be established “upon the outbreak of hostilities”<sup>127</sup> and they are to commence their work “as soon as possible after the neutral members have been approved, and in any case within a period of three months from the date of such approval.”<sup>128</sup> This expediency is crucial so that wounded and sick prisoners of war can be examined and a decision made as to their repatriation in a timely manner.<sup>129</sup>

In addition to repatriation following examination by the commission, the medical authorities of the Detaining Power may unilaterally decide to repatriate a wounded and sick prisoner of war. Pursuant to Article 112 of the Third Geneva Convention, “prisoners of war who, in the opinion of the medical authorities of the Detaining Power, are manifestly seriously injured or seriously sick, may be repatriated without having to be examined by a Mixed Medical Commission.”<sup>130</sup> In such cases, the prisoner must still be consulted to determine whether they consent to the repatriation.<sup>131</sup>

The rationale behind the obligation to repatriate seriously wounded and sick prisoners of war relates to the state of their health, namely, that internment is not needed to prevent them from taking part in hostilities.<sup>132</sup> There is a risk, however, that if their health improves, they could return to the fight.

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mentioned in Article 10. *See id.* art. 112; *see also* COMMENTARY TO GENEVA CONVENTION III, *supra* note 39, at 661. Pictet also notes that

[t]he phrase *all appropriate decisions*, which was adopted in 1929, has a still broader meaning, however; for instance, it permits the Mixed Medical Commissions to request the camp commander to move the patient or exempt him from certain work, as well as to make representations to the camp commander concerning requests presented by the camp physician or surgeon, etc.

*Id.* at 525.

127. Geneva Convention III, *supra* note 6, art. 112.

128. *Id.*, Annex II, art. 9.

129. Following the conclusion of the Second World War, the ICRC convened a meeting of neutral members of mixed medical commissions who were in Switzerland. Those attending considered it “indispensable” that a revised convention on prisoners of war to replace the 1929 Prisoners of War Convention provide that mixed medical commissions be established within three to six months of the outbreak of hostilities. INTERNATIONAL COMMITTEE OF THE RED CROSS, REPORT ON THE MEETING OF NEUTRAL MEMBERS OF THE MIXED MEDICAL COMMISSIONS 4 (1945). The proposal was not included in the Third Geneva Convention.

130. Geneva Convention III, *supra* note 6, art. 112.

131. Geneva Convention III, *supra* note 6, art. 109.

132. *See* Sandra Krähenmann, *Protection of Prisoners in Armed Conflict*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW § 734, at 407 (Dieter Fleck ed., 3d ed. 2013); Marco Sassòli, *Release, Accommodation in Neutral Countries and Repatriation of Prisoners of War*, in THE 1949 GENEVA CONVENTIONS: A COMMENTARY, *supra* note 39, at 1039, 1041.

Accordingly, Article 117 of the Third Geneva Convention provides that “[n]o repatriated person may be employed on active military service.”<sup>133</sup> In contrast to Mixed Medical Commissions, which have been used infrequently,<sup>134</sup> there are numerous examples of the repatriation of seriously wounded and sick prisoners of war during international armed conflict.<sup>135</sup>

To the extent members of the State armed forces or members of the non-State armed group are detained, a similar approach could be taken for seriously wounded and sick detainees in non-international armed conflicts. Indeed, Common Article 3 provides that “[t]he Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.”<sup>136</sup> The provisions of the special agreement could, by analogy, be those of the Third Geneva Convention relating to the repatriation of the seriously wounded and sick, as amended. Equally, the special agreement could be a creative solution tailored specifically to the conflict in question and the particular individuals detained.

While a useful possibility, there are a number of difficulties with the transposition of this procedure to non-international armed conflicts. First, the list of conditions permitting direct repatriation in the Annex to the Third Geneva Convention is outdated.<sup>137</sup> Second, one member of the Mixed Medical Commission is appointed by the detaining power. If a similar approach was taken in the case of non-international armed conflicts, insofar as wounded and sick detainees held by the armed group party to the conflict is concerned, one of the members of the commission would thus be appointed by the non-State armed group. Third, the wounded and sick concerned are to be repatriated “back to their own country,” and of course, there is no

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133. Geneva Convention III, *supra* note 6, art. 117.

134. CATHERINE MAIA, ROBERT KOLB & DAMIEN SCALIA, *LA PROTECTION DES PRISONNIERS DE GUERRE EN DROIT INTERNATIONAL HUMANITAIRE* 487 (2015). Mixed Medical Commissions were used during the Vietnam War and the armed conflict between Iran and Iraq. *See* Sassòli, *supra* note 132, at 1042.

135. *See* ALLAN ROSAS, *THE LEGAL STATUS OF PRISONERS OF WAR* 472 (1976); Howard S. Levie, *Prisoners of War in International Armed Conflict*, 59 *INTERNATIONAL LAW STUDIES* 409–10 (1978); MAIA, KOLB & SCALIA, *supra* note 134, at 457–61; Sassòli, *supra* note 132, at 1042–43.

136. *See, e.g.*, Geneva Convention I, *supra* note 6, art. 3(2).

137. Writing in 1965, Jean-Maurice Rubli noted that the Model Agreement “dates back to 1949 and is not abreast of present-day medical knowledge.” J.M. Rubli, *Repatriation and Accommodation in Neutral Countries of Wounded and Sick Prisoners of War*, 57 *INTERNATIONAL REVIEW OF THE RED CROSS* 623, 629 (1965).

parallel in non-international armed conflicts occurring within a single State territory.

Still, none of these difficulties is insurmountable. The Mixed Medical Commission process of the Third Geneva Convention should not simply be “copied and pasted” when applied in non-international armed conflicts. It would need to be amended to fit the realities and experiences of non-international armed conflicts in general and the specific conflict in particular. Indeed, even in international armed conflicts, the list of conditions simply constitutes a “basis for negotiation.”<sup>138</sup> Accordingly, there is freedom to expand on the conditions that would lead to repatriation.

There are a number of different options regarding the appointment of members to the commission. It could be composed entirely of medical personnel appointed by the ICRC. If the input of the armed group is important—and there are good reasons why it would be<sup>139</sup>—the ICRC could prepare a list of suitably qualified personnel from which it could select one name. Alternatively, the armed group could put forward a list of acceptable individuals from which the ICRC would choose the member. Another option would be to follow the Third Geneva Convention model and allow the armed group to select a member of the commission.

Repatriation in non-international armed conflicts is more akin to release, that is, the deprivation of liberty of the individual concerned would end. Repatriation also could refer to the individual’s return to the party on which the individual depended (the State or armed group), subject to the consent of the individual concerned.

One example of release and repatriation in a non-international armed conflict is the Humanitarian Exchange Accord concluded between the Colombian government and the Fuerzas Armadas Revolucionarias de Colombia (FARC) in 2001. That Accord provided for the exchange of “members of the FARC-EP, legally deprived of their freedom, who are sick” and “sick soldiers and policemen” held by the FARC.<sup>140</sup> A group of doctors recommended by the ICRC performed the medical examination of FARC detainees held by Colombia.<sup>141</sup> Following the medical examination, the government

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138. COMMENTARY TO GENEVA CONVENTION III, *supra* note 39, at 650.

139. The primary reason is ownership of the process, as a non-State armed group is more likely to respect and follow the commission’s decisions if it is a part of the planning process.

140. Government-FARC Humanitarian Exchange Accord, Colom.-FARC, June 2, 2001 (English), [https://adamisacson.com/files/old\\_cip\\_colombia/060202.htm](https://adamisacson.com/files/old_cip_colombia/060202.htm).

141. *Id.*

identified fifteen detainees who, in its opinion, fell within the scope of the agreement; the FARC-EP identified forty-two soldiers and police officers.<sup>142</sup> The consent of the individuals was required.<sup>143</sup> Ultimately, sixty-nine individuals were released.<sup>144</sup> The Accord also provided that “[g]iven that they are sick, the members of the FARC-EP covered by this Agreement will not take part in future hostilities.”<sup>145</sup> Although diverging in certain important respects from the Third Geneva Convention model—not least of which is that it was an exchange rather than unilateral release—the Accord is instructive in demonstrating that a release and repatriation process can be utilized in non-international armed conflicts. It is particularly notable for the requirement of consent on the part of the individuals concerned and the commitment that released FARC-EP members would not take part in hostilities in the future, both of which parallel the law of international armed conflict.

In other non-international armed conflicts, individual wounded and sick detainees have been released or exchanged following negotiations that included ICRC delegates. In 2008, two members of the armed forces of Niger who required urgent medical care were released by the Mouvement des Nigériens pour la Justice under ICRC auspices.<sup>146</sup> Half a century earlier, during the non-international armed conflict in Cuba, Fidel Castro, then-Commander-in-Chief of the rebel group, wrote to the ICRC indicating his desire to hand over wounded members of the armed forces held by the armed group. Castro wrote:

After the latest battle in the Sierra Maestra, a great many wounded Batista soldiers remain in our hands. It has always been the rebels’ custom to care for enemy soldiers wounded in the fighting in our improvised hospitals, thereby saving the lives of many of them. This time, however, we cannot put our humanitarian principles fully into practice because there are too many casualties. For lack of beds, seriously wounded soldiers are lying on the ground, without even a blanket, and we are unable to provide them

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142. *Id.*

143. *Id.*

144. INTERNATIONAL COMMITTEE OF THE RED CROSS, ANNUAL REPORT 2001, at 225 (2002). FARC subsequently released 304 military and police personnel the same year. *Id.*

145. Government-FARC Humanitarian Exchange Accord, *supra* note 140.

146. News Release 08/19, International Committee of the Red Cross, Niger: Detainees Released under ICRC Auspices (Feb. 4, 2008), <https://www.icrc.org/eng/resources/documents/news-release/2009-and-earlier/niger-news-040208.htm>. *See also* INTERNATIONAL COMMITTEE OF THE RED CROSS, ANNUAL REPORT 1964, at 8–9 (1965) (discussing a similar occurrence in an armed conflict in Yemen).

with the food which their condition requires. Medicines are in short supply . . . and most of the medicines we had have been used to care for wounded prisoners. We have publicly proposed that a commission of the Cuban Red Cross should come to fetch the wounded and have stated that we are ready to hand them over so that they can receive the treatment they need . . .<sup>147</sup>

Subsequently, a two-day truce was declared and 253 wounded and sick soldiers were handed over to the Cuban Red Cross and Cuban armed forces under the agreement reached following receipt of the Castro proposal.<sup>148</sup>

Although release and repatriation of wounded and sick detainees is primarily in the interests of the detainee, it benefits all concerned. The individual detainee is no longer in the hands of the adverse party, and is likely to be closer and have greater access to family and friends and receive superior medical care and assistance. The detaining authority would no longer need to provide medical care to the detainee, which would be a considerable benefit if it has limited resources, and the party to which the individual belongs would no longer have one of its members in the hands of its adversary.

## 2. Other Detainees

In addition to the repatriation of certain categories of wounded and sick prisoners of war, the Third Geneva Convention also provides for the direct repatriation of “able-bodied prisoners of war who have undergone a long period of captivity.”<sup>149</sup> This process is to occur pursuant to an agreement between the parties.<sup>150</sup> Given that repatriation would take place pursuant to

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147. Telegram from Fidel Castro, Commander-in-Chief of the Rebel Army, to the International Committee of the Red Cross (July 3, 1958) (in ICRC Archives B AG 200 060). The English translation is taken from Françoise Perret, *Activities of the International Committee of the Red Cross in Cuba 1958–1962*, 38 INTERNATIONAL REVIEW OF THE RED CROSS 655, 656–57 (1998).

148. *Id.* at 662.

149. Geneva Convention III, *supra* note 6, art. 109.

150. In full, Article 109 states:

Throughout the duration of hostilities, Parties to the conflict shall endeavour, with the cooperation of the neutral Powers concerned, to make arrangements for the accommodation in neutral countries of the sick and wounded prisoners of war referred to in the second paragraph of the following Article. They may, in addition, conclude agreements with a view to the direct repatriation or internment in a neutral country of able-bodied prisoners of war who have undergone a long period of captivity.

*Id.*

an agreement between the parties, the parties could decide to extend repatriation to other detainees who are particularly vulnerable.

In addressing the release and repatriation of internees, Article 132 of the Fourth Geneva Convention provides:

The Parties to the conflict shall . . . endeavour during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence . . . of certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time.<sup>151</sup>

Here, Article 132 refers to “the main cases in which there are humanitarian reasons for the conclusion of such agreements.”<sup>152</sup> Again, the conclusion of an agreement between the parties to the conflict envisages release, repatriation, and return.

Examples of both release and repatriation agreements, as well as unilateral releases for humanitarian reasons, can be found in several non-international armed conflicts. In an agreement reached with the Ejército de Liberación Nacional, a Colombian armed group, the Acuerdo de la Puerta del Cielo provided that “from today, the detention of minors and people over 65 years old stops” and “[i]t is not allowed, under any circumstance, to detain pregnant women.”<sup>153</sup> Another armed group stated, “it releases all foreign detainees, ill persons, and persons over the age of 55.”<sup>154</sup> In 1997, during the Second Sudanese Civil War (1983–2005), at least some “female detainees with children” were released.<sup>155</sup> In 2010, during the armed conflict in the Philippines, the New People’s Army (NPA) captured four members of the Philippine National Police Special Action Force.<sup>156</sup> The individuals were wounded

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151. Geneva Convention IV, *supra* note 6, art. 132.

152. OSCAR M. UHLER ET AL., COMMENTARY TO GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 512 (Jean Pictet ed., 1958) [hereinafter COMMENTARY TO GENEVA CONVENTION IV].

153. Acuerdo de Puerta del Cielo, July 15, 1998, <http://peacemaker.un.org/colombia-acuerdopuertadelcielo98> (“a partir de hoy, cesa la retención de menores de edad y de mayores de 65 años y en ningún caso se privar de la libertad a mujeres embarazadas”) (translation by author).

154. SIVAKUMARAN, *supra* note 46, at 299.

155. G.A Res. 51/112, ¶ 11 (Mar. 5, 1997).

156. Press Release, Ruth de Leon, Exec. Dir., Int’l Info. Office, Nat’l Democratic Front of the Phil., NDFP Denies Use of Anti-Personnel Mines, Emphasizes Its Adherence to International Humanitarian Law (Apr. 25, 2010), <http://bulatlat.com/main/2010/04/26/>

during the capture; the NPA administered first aid to the wounded and then released them immediately “so that they could be brought to the nearest hospitals.”<sup>157</sup> In other armed conflicts, detainees have been released unilaterally<sup>158</sup> or pursuant to an agreement concluded with the adverse party, often during the course of peace negotiations.<sup>159</sup>

### B. *Accommodation and Internment in a Neutral State*

In addition to release and repatriation, the Third Geneva Convention obliges the parties to the conflict to “endeavour . . . to make arrangements” for the accommodation in neutral States of certain categories of the wounded and sick.<sup>160</sup> The parties “may” also conclude agreements with respect to the in-

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ndfp-denies-use-of-anti-personnel-mines-emphasizes-its-adherence-to-international-humanitarian-law/comment-page-1/.

157. *Id.*

158. See, e.g., ROSAS, *supra* note 135, at 118, 473 (discussing the unilateral release of detainees in the Algerian civil war); Françoise Krill, *The Elderly in Situations of Armed Conflict*, ICRC (May 22, 2001), <https://www.icrc.org/eng/resources/documents/misc/57jqx9.htm> (noting the release of the elderly during armed conflicts in Cambodia, Colombia, and Tajikistan).

159. See, e.g., Agreement on Permanent Ceasefire and Security Arrangements Implementation Modalities between the Government of the Sudan (GOS) and the Sudan People’s Liberation Movement/Sudan People’s Liberation Army (SPLM/SPLA) during the Pre-Interim and Interim Periods art. 1.8, Sudan-SPLM/SPLA (Dec. 31, 2004), [https://www.usip.org/sites/default/files/file/resources/collections/peace\\_agreements/ceasefire\\_agreement.pdf](https://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/ceasefire_agreement.pdf); Permanent Rep. of the Russian Federation to the U.N., Letter dated July 1, 1997 from the Permanent Rep. of the Russian Federation to the United Nations addressed to the Secretary-General, U.N. Doc. A/52/219 S/1997/510 (July 2, 1997) (transmitting Protocol of Mutual Understanding between the President of Tajikistan, E. S. Rakhmonov, and the Leader of the United Tajik Opposition, S. A. Nuri, June 27, 1997); Charge D’Affairs A.I. of the Permanent Mission of Benin to the U.N., Letter dated August 6, 1993 from the Charge D’Affairs A.I. of the Permanent Mission of Benin to the United Nations addressed to the Secretary-General, U.N. Doc. S/26272 (Aug. 9, 1993) (transmitting the Cotonou Agreement between the Interim Government of National Unity of Liberia, the National Patriotic Front of Liberia and the United Liberation Movement of Liberia for Democracy art. 10, July 25, 1993).

160. Geneva Convention III, *supra* note 6, art. 110.

The following may be accommodated in a neutral country:

(1) Wounded and sick whose recovery may be expected within one year of the date of the wound or the beginning of the illness, if treatment in a neutral country might increase the prospects of a more certain and speedy recovery.

ternment in a neutral State of “able-bodied prisoners of war who have undergone a long period of captivity,”<sup>161</sup> but they are not obliged to do so. The Convention also encourages the detaining power, the power on which the prisoner of war depends, and a neutral power to conclude agreements that enable prisoners to be interned in the neutral State.<sup>162</sup> This provision concerns other prisoners of war, principally those who are in good health.<sup>163</sup> Similar to repatriation of certain categories of wounded and sick prisoners of war, accommodation in a neutral State prevents those interned from participating in the hostilities. Moreover, it also “has the advantage of the POWs not being in the power of hostile forces but rather in a country which is often able and willing to offer better medical treatment, accommodation, and services than belligerents.”<sup>164</sup>

For its part, Article 132(2) of the Fourth Geneva Convention encourages parties to a conflict to conclude agreements for accommodation in a neutral State of children, pregnant women, mothers with infants and young children, the wounded and sick, and long-time internees.<sup>165</sup> A similar practice could be followed in non-international armed conflicts.

It would generally be impossible to accommodate all persons detained in a non-international armed conflict in a third (“neutral”) State,<sup>166</sup> nor would it necessarily be appropriate to do so. The general rationale for accommodation in a third State, but not a prerequisite for it, is that the detaining authorities may be incapable of affording detainees the minimum treatment standards required by law. This concern was illustrated in Canada’s proposed new article in the prisoners of war convention then under negotiation during the 1949 Diplomatic Conference, which read:

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(2) Prisoners of war whose mental or physical health, according to medical opinion, is seriously threatened by continued captivity, but whose accommodation in a neutral country might remove such a threat.

*See also id.*, Annex I: Model Agreement Concerning Direct Repatriation and Accommodation in Neutral Countries of Wounded and Sick Prisoners of War. The Model Agreement includes among those who are eligible for accommodation, “All women prisoners of war who are pregnant or mothers with infants and small children.”

161. *Id.* art. 109.

162. Geneva Convention III, *supra* note 6, art. 111.

163. COMMENTARY TO GENEVA CONVENTION III, *supra* note 39, at 521.

164. Sassòli, *supra* note 132, at 1042.

165. Geneva Convention IV, *supra* note 6, art. 132.

166. The term “third State” is used here and throughout this article to describe a State not involved in the conflict and to provide a parallel to the use of “neutral State” in the law of international armed conflict.



If the Detaining Power is not in a position, for any reasons, to conform to certain minimum standards as regards the treatment of prisoners of war as envisaged in the present Convention, special agreements shall be concluded among the Detaining Power, the Power on which the prisoners of war depend and a Neutral Power which may be acceptable to the two Powers, which will enable prisoners of war to be detained in future in a neutral territory until the close of hostilities, the whole expense to be borne by the Power on which the prisoners of war depend.<sup>167</sup>

As discussed above, the inability of the detaining authority to meet certain minimum standards of protections and safeguards is a particular risk for vulnerable categories of detainees. It is of little surprise then that the Third Geneva Convention refers to certain categories of wounded and sick prisoners of war, as well as able-bodied prisoners of war detained for a lengthy period, in its provisions addressing termination of captivity prior to the close of hostilities.<sup>168</sup> During the Second World War, the ICRC raised the possibility of accommodation in neutral States of long-time prisoners, particularly “older men, for whom conditions of life in camp were very difficult to bear.”<sup>169</sup> In its provisions addressing release, repatriation, and accommodation in neutral countries, the Fourth Geneva Convention references “in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time.”<sup>170</sup> As is evident from the introductory term “in particular,” the list is not exhaustive.<sup>171</sup> Thus, to the extent that they do not fall within the wounded and sick, persons with disabilities could be added to this list.

The inability to meet required treatment standards for those detained is perhaps more pronounced in non-international armed conflicts than in international armed conflicts, with the greatest concern in instances when the detention is carried out by non-State armed groups with limited resources.

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167. 2 A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 292 (1949); *see also id.* at 365.

168. Geneva Convention III, *supra* note 6, arts. 109–10.

169. 1 INTERNATIONAL COMMITTEE OF THE RED CROSS, REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS ON ITS ACTIVITIES DURING THE SECOND WORLD WAR 384 (1948) [hereinafter ICRC ACTIVITIES DURING THE SECOND WORLD WAR]; *see also* Rubli, *supra* note 137, at 623 (referring to “aged prisoners,” “those who have undergone a long period of captivity,” and “those whose mental health has deteriorated”).

170. Geneva Convention IV, *supra* note 6, art. 132.

171. COMMENTARY TO GENEVA CONVENTION IV, *supra* note 152, at 512 (noting that the article “quotes the main cases in which there are humanitarian reasons for the conclusion of such agreements”).

As the Pictet *Commentary* notes, internment in a neutral State for the seriously wounded or sick is “highly advantageous from the humanitarian point of view, since it can lead to recoveries which would be impossible in captivity; moreover, it ensures that such prisoners of war will not after recovery make any active contribution in their own country to the war effort.”<sup>172</sup> To use the language of Article 110 of the Third Geneva Convention in the context of a non-international armed conflict, if medical treatment in a third State “might increase the prospects of a more certain and speedy recovery,” or if the health of the detainee is “seriously threatened by continued detention but accommodation in a neutral country might remove such a threat,” interning the detainee in that State could provide a suitable, or even preferable, option.

However, it is not only the wounded and sick that could benefit from internment in a third State. Long-term, able-bodied detainees might benefit, as a lengthy period of captivity “can seriously affect the psychological condition” of detainees “and make it extremely difficult for them to readapt themselves to normal life.”<sup>173</sup> Furthermore, if, as an example, the detaining authorities cannot provide the necessary care and attention to pregnant women or women who are nursing and these women cannot be transferred to a detention facility in which this care and attention can be provided, the parties should endeavor to conclude an agreement providing for internment in a third State. Or, as another example, if the detention facility cannot be made handicap-accessible and the disabled individual cannot be transferred to a detention facility that is handicap-accessible, the parties should endeavor to conclude a similar agreement.

In essence, the detaining power should endeavor to conclude agreements relating to the transfer of the individuals concerned to a State that can intern these individuals in the conditions required by law. By analogy to Article 12 of the Third Geneva Convention and Article 45 of the Fourth Geneva Convention, the detaining authority would need to satisfy itself of the “willingness and ability” of the receiving State to apply the law of non-international

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172. COMMENTARY TO GENEVA CONVENTION III, *supra* note 39, at 511.

173. *Id.* at 521. Article 72 of the 1929 Prisoners of War Convention included the possibility of “accommodation in a neutral country of prisoners of war in good health who have been in captivity for a long time” and noted explicitly that this provision is for “humanitarian reasons.” Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343. Levie notes that “[m]any prisoners of war wounded and captured early in World War I developed a ‘barbed-wire’ psychosis that was disabling in and of itself.” Levie, *supra* note 135, at 413.

armed conflict. The detainees would also need to consent to the transfer. Alternatively, the parties could decide to release and repatriate the detainee.

During the First World War, large numbers of individuals were interned in neutral States: 16,000 British and German prisoners of war were interned in Holland and 26,000 in Switzerland.<sup>174</sup> In armed conflicts since the First World War, prisoners have generally not been accommodated in a neutral State; instead, States have preferred to repatriate the wounded and sick.<sup>175</sup> One exception was the armed conflict in Afghanistan (1979–89). During the conflict, the ICRC negotiated with the USSR, Afghan armed opposition groups, Pakistan, and Switzerland and reached an agreement under which Soviet soldiers detained by Afghan armed opposition groups could be interned in a third State (Switzerland) for a period of two years, after which they would return to their country of origin.<sup>176</sup> This was done by analogy to the Third Geneva Convention.<sup>177</sup> The ICRC met with a number of Soviet soldiers held by Afghan opposition groups and informed them of the possibility of transfer, eleven of whom agreed to it. Following the two-year period, some returned to the USSR, others indicated that they did not wish to return and their status was assessed under the relevant Swiss law.<sup>178</sup>

The rarity of this practice is due to the need to reach agreement between several actors, including that of the parties and a third State. During the Nigerian civil war, a proposal to transfer certain detainees to a third State was opposed by the government, which feared “that this would imply a certain implicit recognition of Biafra.”<sup>179</sup> During the Second World War, following a request by the ICRC, some neutral States indicated that they could receive “only a limited number of war-disabled,” while others indicated that they were not in a position to accommodate any prisoners of war.<sup>180</sup>

Issues may also arise in determining an appropriate third State in a non-international armed conflict; however, this difficulty is not insurmountable. Given that accommodation would take place pursuant to an agreement be-

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174. HERSCH LAUTERPACHT, *THE WAR OFFICE, GREAT BRITAIN, THE LAW OF WAR ON LAND: BEING PART III OF THE MANUAL OF MILITARY LAW* 85 n.1 (1958).

175. See ICRC ACTIVITIES DURING THE SECOND WORLD WAR, *supra* note 169, at 382–83, 385; Levie, *supra* note 135, at 415–16.

176. Press Release, International Committee of the Red Cross (May 20, 1984), *reprinted in* 281 INTERNATIONAL REVIEW OF THE RED CROSS 239–40 (1984).

177. *Id.*

178. *Id.*

179. ROSAS, *supra* note 135, at 197.

180. ICRC ACTIVITIES DURING THE SECOND WORLD WAR, *supra* note 169, at 384.

tween the parties to the conflict and that State, any State with which an agreement could be reached would qualify. Agreement also needs to be reached on the modalities and practicalities of the detention, such as the means of transfer of the individuals to the third State, the costs associated with the accommodation,<sup>181</sup> and the duration of the internment. All these factors explain why individuals are only rarely transferred to a third State for internment. If transfer is a possibility, as in the Afghanistan example, detainees should be consulted on the possibility of accommodation in the third State and should not be transferred without their consent.<sup>182</sup>

Despite the difficulties surrounding internment in a third State, the possibility is an important one. It helps to ensure that detainees are treated and housed in conditions required by law. It also provides an assurance to the former detaining authorities that the individuals will not be able to participate in the hostilities. However, it does require a willing third State. It also means that the individuals concerned may be far away from their families.

In sum, although rarely used, the possibilities of release, repatriation, and internment in a third State can prove useful especially for particularly vulnerable groups of persons. The practice of armed conflicts in which these possibilities have been used deserves to be better known.

## V. CONCLUSION

International humanitarian law itself recognizes that certain categories of persons are particularly vulnerable during armed conflicts and affords them specific protections. This includes the wounded and sick, women, children, and persons with disabilities. In addition to the specific protections that are afforded to such persons, the general protections of international humanitarian law continue to apply. These general protections will sometimes have

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181. This might prove difficult for an armed group since, if Article 116 of the Third Geneva Convention were to be applied by analogy, the costs of transporting an individual to a neutral State is to be borne “from the frontiers of the Detaining Power, by the Power on which the said prisoners depend.” See Geneva Convention III, *supra* note 6, art. 116.

182. Sassòli notes that

[t]he precedent of Afghanistan equally demonstrates that in state practice, the wishes of the individual POWs were ascertained and respected before they were accommodated in a neutral country. It is not certain that Article 109 paragraph 3 also applies to internment in neutral countries. However, a Detaining Power transferring such POWs against their will to a neutral country should at least take steps to ensure that that country will respect any wishes the POWs might have not to be repatriated at the end of active hostilities.

Sassòli, *supra* note 132, at 1046.

to be tailored to meet the needs of the relevant detainees. For example, the general standard that detainees are to be “afforded safeguards as regards health and hygiene”<sup>183</sup> will mean different things in practice for the wounded and sick, women, and men.

The realities of armed conflict—with parties with different capabilities and different types of detention facilities—mean that some parties might have difficulty complying with all the rules relating to conditions of detention in all circumstances. The law tries to cater for differing parties and abilities through a variety of approaches. Some rules are set out as core minimum standards, which are applicable at all times; other rules are applicable depending on the capabilities of the party.<sup>184</sup> Some rules are drafted in relatively broad terms; others provide that “all appropriate steps shall be taken.”<sup>185</sup>

In some instances, however, none of these approaches will be able to strike the necessary balance between protecting vulnerable detainees and the realities of armed conflict. In such instances, greater attention should be paid to additional possibilities that exist in the law of international armed conflict, namely release and repatriation as well as accommodation and internment in a neutral State. Although used infrequently, the practice on point deserves to be better known and similar approaches could be used with respect to particularly vulnerable detainees in non-international armed conflicts.

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183. Additional Protocol II, *supra* note 6, art. 5(1)(b).

184. *Id.* arts. 5(1), 5(2).

185. *See id.* art. 4(3)(b).